UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

UNITED SITE SERVICES OF CALIFORNIA, INC.

and **Cases: 20-CA-139280**
20-CA-149509

TEAMSTERS LOCAL 315, IBT

Richard J. McPalmer Esq., and *Elvira Pereda, Esq.,* for the General Counsel.
David S. Durham, Esq., and *Christopher M. Foster Esq. (DLA Piper LLP),* for the Respondent.

DECISION

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. This case was tried before me on August 24–27, 2015, in San Francisco, California. Charging Party (Union) filed charges on October 20, 2014, and April 3, 2015, and an amended charge dated May 5, 2015, alleging violations by United Site Services of California Inc. (Respondent) of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (the Act). An amended consolidated complaint was filed on July 21, 2015. Respondent filed an answer to the amended consolidated complaint denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross examine witnesses, and to file briefs. I carefully observed the demeanor of witnesses as they testified and I rely on those observations here. I have studied the whole record, and based upon the detailed findings and analysis below, I conclude that the Respondent violated the Act as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that

1. (a) At all material times, Respondent has been a corporation with a place of business at 1 Oak Road, Benicia, California (Respondent's facility), and has been engaged in the business of providing rental portable restrooms, temporary fencing, and sanitation facilities.

(b) In conducting its operations during the 12-month period preceding July 21, 2015, Respondent purchased and received at Respondent's facility goods valued in excess of $50,000 directly from points outside the State of California.

(c) In conducting its operations during the 12-month period ending December 31, 2013, Respondent derived gross revenues in excess of $250,000.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

(a) Steve Gutierrez- Area Manager
(b) Aggie T. Haley- Human Resources Manager
(c) Mark Bartholomew- Senior Vice President of Operations
(d) Mike Kivett- Reno Area Manager
(e) David Sattler- Supervisor/Lead Driver

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

United Site Services, Inc. is a company that provides portable toilet and temporary fencing rentals. The company has multiple facilities but this case relates to the facility in Benicia California. The company relies upon employees with varying job titles to perform the work. The company employs the following types of employees:

1) Yard associates- whose work at the employer's facility to wash, inspect, prepare, and repair equipment;
2) Pick Up an Delivery (P&D) driver's-whose duties include picking up and delivering portable toilets, installing holding tanks, and completing any necessary repairs to equipment in the field. P&D drivers must hold a Class C drivers license.
3) Fence drivers- whose duties include the delivery and installation of fence. Fence drivers must hold a Class C driver's license.
4) Fence helper-whose duties are to assist the fence driver's with installation and delivery of fencing materials.
5) Service technicians- whose duties are to drive from site to site pumping out toilets or holding tanks and to clean and restock the portable toilets. Periodically, after the

trucks are filled they must return to the facilities to empty their tanks. They must also hold a Class C driver's license.

Although each employee has a regularly assigned position many are cross trained and oftentimes cover other positions as business needs dictate. Thus the employees perform duties of the other positions. For example, it is not uncommon for P&D driver's or Fence driver's to perform the work of Service Technicians and visa versa.

On September 23, 2013, the Union filed a petition to represent a bargaining unit of the employer's workers. (GC Exh. 2.) On November 21, 2015, the Union won the election. (Jt. Exh. 1.) On January 7, 2014, the Board certified the Union as representative of the following Unit:

> All full time and regular part-time Service Technicians, Lead Service Technicians, Pick Up and Delivery Drivers, Mechanics, Laborers, and Fence Installers employed by the Employer at its 1 Oak Road, Benecia California facility, but excluding Dispatchers, supervisors and guards as defined by the Act. (GC Exh. 3.)

From February to July 2014, the parties engaged in negotiations for an initial contract. The parties held multiple bargaining sessions. In the course of this bargaining, unit employees twice voted on contract proposals. On July 16, 2014, the employer provided its Last Best Final Offer (LBFO). (R. Exh. 2.) On July 23, 2014, the employees unanimously rejected the proposal. (R. Exh. 11–17.) At this same meeting the employees voted to authorize a strike. Despite the authorization to strike the strike did not begin immediately. The employees directed the Union to investigate other options to put pressure on the employer before going on strike. The Union also needed to seek approval from the International Brotherhood of Teamsters for strike benefits. After the efforts by the Union to put pressure on the employer did not yield results satisfactory to the employees, they decided to go on strike. On October 5, 2014, the Union notified the employer that it would strike the next day. (GC Exh. 5.)

The strike at the Benicia facility began on October 6, 2014. It is undisputed that the strike was an economic strike. (Tr. 35:12–13.) At the time of the strike, the unit consisted of 25 active employees and a vacant P&D Driver position. Of the 25 employees 21 of them went out on strike with the majority picketing the entrance to the employer's facility every day of the strike.[1] The employer had in place a contingency plan for the strike which relied upon employees from other facilities to assist and cover the striker's positions. (Jt. Exh.1, GC Exh. 10.) The employer also used temporary employees to cover its Bencia operations who were hired through "Labor Finder's" a temporary employment agency. Also on the first day of the strike, the employer through its human resources manager, Augeda Halley, area manager, Steve Gutierrez, and vice president, Steve Wit began hiring permanent replacements. (Jt. Exh. 1 Stip. 21.) The offers were made for "permanent full time position[s], and to work indefinitely even after the strike ended." (R. Exh. 12–through 12–71). The written offers included the following language

[1] Michael Knutsen, Javier Santiago, Oscar Reyes Perusquia, and Richard Rotti did not join the strike. (Jt. Exh. 1.)

> You understand and agree that you have been advised that a strike or other active labor dispute exists between USS and Teamsters Local 315 at the Benecia location and that the position offered is as a permanent replacement for a striker who is presently on strike against USS at the Benecia location. You further understand that, as a permanent replacement, if the strike ends, you will not be displaced to make room for the returning strikers. . . . (emphasis in original). (R. Exh. 12–1 through 12–74.)

Included among the written offer was a written offer of acceptance. The document was titled, "Acceptance of Offer of Employment as Permanent Replacement" and contained language similarly to the offer indicating that the employee would "immediately' accept employment as a "permanent replacement" and that the person would not be displaced once the strike ended. (Exh. 12–1 through 12–74.)

The Human Resources Manager Halley began to make offers and kept a log of the dates and times of offers and receipt of written acceptance. The log contained the following information:

Permanent Position	Name	Offer and Acceptances	
		Verbal Acceptance Date and Time (See Resp. Exh. 14)	Written Acceptance Date and Time (See Resp. Exh. 12-1
Mechanic	Michael Knutsen	10/14, 5:29 PM	10/14, 5:29 PM
Fence Driver	James Matthews	10/6, 4:15 PM	10/6, 4:50 PM
Service Technician	Christopher Orr	10/6, 9:30 AM	10/6, 9:30 AM
Service Technician	Martin Escobar Segura	10/7, 7:15 AM	10/6, 4:15 PM
Service Technician	Francisco Hernandez Rocha	10/7, 7:10 AM	10/6, 4:13 PM
Service Technician	Armando Martinez Saucedo	10/7, 8:40 AM	10/13, 6:00 PM
Service Technician	Alfonzo Meza	10/7, 7:55 AM	10/8, 11:19 AM
Service Technician	Jorge Recinos (or Racinos)	10/7, 9:30 AM	10/8, 9:30 AM
Service Technician	Desiree Martinez	10/10, 5:30 AM	N/A
Service Technician	Paul Barron	10/10, 5:00 AM	10/10, 5:00 AM
Service Technician	Greg Beddoes	10/10, 5:30 AM	N/A
Service Technician	Javier Santiago	10/14, 7:20 PM	10/10, 7:30 PM
Service Technician	Darryl Gaines	10/14, 6:43 PM	10/14, 6:43 PM
Service Technician	Brian Flores	10/16, 1:00 PM	10/16, 1:00 PM
Service Technician	Nicholas Cermeno- Hernandez	10/16, 5:00 AM	10/16, 8:15 AM
Service Technician	Alvin Williams	10/16, 1:29 PM	10/16, 12:29 PM
Service Technician	Kevin Murphy	10/16, 2:50 PM	10/16, 7:00 PM
Yard Associate	Joshua Johnson	10/6, 4:15 PM	10/6, 4:50 PM
Yard Associate	Jesse Hernandez	10/13, 2:15 PM	10/14, 2:41 PM
Yard Associate	Maurice Espinoza	10/16, 7:38 AM	10/6, 9:16 AM
Yard Associate	Julio Campos	10/16, 12:39 PM	10/16, 12:59 PM
Yard Associate	Lester Moreno	10/16, 2:15 PM	10/18, 2:20 PM
Yard Associate	Antoine Frazer	10/16, 2:47 PM	10/17, 7:20 AM
Pick Up & Delivery Driver	Richard Wilkerson	10/8, 3:30 PM	10/14, 7:36 PM
Pick Up & Delivery Driver	Antony Boatmun	10/10, 3:45 PM	10/13, 8:10 AM
Pick Up & Delivery Driver	Michael Neitz	10/14, 1:22 PM	10/14, 1:22 PM
Pick Up & Delivery Driver	James Brown	10/15, 3:20 PM	10/15, 3:57 AM

Despite the employer's ongoing efforts to hire permanent replacements beginning on the first day of the strike, Respondent did not inform the Union of its hiring efforts until 3:40 p.m. on October 16, 2014. (GC Exh. 6.) The notification which arrived via email advised that the employer had, "hired permanent replacements to fill all of the positions vacated by the striking employees." (GC Exh. 6.)

The next evening on October 17, 2014, the Union held a meeting and discussed the employer's email of October 16, 2014, with the strikers. Upon learning of the employers efforts to hire permanent replacements the strikers chose to return to work. (Tr. 141.) At 6:05 p.m. of that same evening, the Union emailed to Respondent a letter terminating the strike and making an unconditional offer of its employees to return to work. (GC Exh. 7.) On October 18, 2014, Respondent confirmed that there were no unit positions available and advised that the striking employees had been placed on a preferential recall list. The correspondence also requested up to date contact information for all of the strikers. (GC Exh. 8.) On October 22, 2014, the employer sent another email requesting up to date contact information for the strikers. (GC Exh. 9.) On October 23, 2014, the Union replied advising that it would "confirm the correct addresses and provide updates as necessary." (GC Exh. 9.) On October 27, 2014, the Union provided some updated contact information. (GC Exh. 9.)

Respondent, thereafter, put in place its procedures for preferential recall. (R. Exh. 20.) Under its process, the area manager, Steve Gutierrez would make a determination that a position was vacant he would then inform the Human Resources Manager Aggie Halley who would then refer to the preferential recall list and contact two former strikers with the highest seniority. She would contact them by both calling their phone numbers of record and also mailing letters to their address of record. If both employees accepted and only one position was available the position would be offered to the person with the most seniority and the less senior person would remain eligible for preferential recall. If the person did not accept the position then the employer considered their employment relationship ended at that point in time. (Tr. 268, 270.) If Halley found there were no former strikers who held a position to be filled, then Halley would offer it to a former striker in another position with the understanding that they would still be eligible for preferential recall to their former or substantially similar position. (Tr. 265.)

The first offer of reinstatement went out on December 8, 2015, and continued through June 9, 2015. Sometime in mid-January (a time when only three of the former striking employees had returned to work) a petition was circulated among the employees. The petition contained the following language:

> We the employees of United Site Services a 1 Oak Road, Benicia CA 94510 are hereby giving notice to the Teamsters Local 315 that we do NOT (emphasis in original) want any association or Representation from the Teamsters Local Union 315 effective immediately. (R. Exh. 9.)

The petition was signed by 24 employees and most signed with dates next to their names. Some signed on January 5, 2015, others, January 7, 2015, and two signed on February 11, 2015. Two employees that signed the petition did not indicate the date they signed. (R. Exh. 9.) The petition was delivered by Richard Wilkerson, a permanent replacement employee to the Senior Vice President of Operations Mark Barthholomew. Bartholomew sent the petition to the Human

Resources Manager Halley and asked her to verify that the signatures on the petitions matched signatures in the employees' records. (Tr. 433.) Halley conducted the verification process and reported back that in fact the signatures matched. (Tr. 433.) By email dated March 27, 2015, Bartholomew sent a letter to the Union which set forth the following:

> We are in possession of objective evidence that your union no longer represents a majority of the employees at United Site Services a majority of the employees at the United Site Services bargaining unit. Accordingly United Site Services hereby withdraws recognition from your union in this unit effectively immediately. (GC Exh. 12.)

Despite the withdrawal of recognition, Respondent continued to offer reinstatement to former striker's with the last offer being a Service Technician offer made to David Reeves who declined and chose to remain as a P&D driver on June 9, 2015. (GC Exh. 48.)

B. Analysis

i) Respondent's Violation of the Act

a) The Failure to Recall Striking Workers

The court in *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 191–92 (2d Cir. 2006), succinctly set forth the applicable legal standards as follows:

> Section 7 of the Act, 29 U.S.C. § 157, grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See also 29 U.S.C. § 163 ("Nothing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . ."). To implement this right, § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their § 7 rights. And § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer to "discourage membership in any labor organization." Under Supreme Court precedent, an employer that refuses to reinstate economic strikers violates § 8(a)(3) unless it can demonstrate that it acted to advance a "'legitimate and substantial business justification[*192].'" See *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 378, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967)). The hiring of permanent replacement workers amounts to one such legitimate and substantial business justification. See *NLRB v. Int'l Van Lines*, 409 U.S. 48, 50, 93 S.Ct. 74, 34 L.Ed.2d 201 (1972) ("[A]n employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements."); *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n. 8, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983) ("The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of [Fleetwood Trailer] that the employer have a legitimate and substantial justification for its refusal to reinstate strikers.") (internal quotation marks omitted).

Consequently, "[w]here employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally." *Belknap*, 463 U.S. at 493, 103 S.Ct. 3172. At the same time (as the Board recognized), the Act is violated if "an independent unlawful purpose" motivated the hiring of permanent replacements. 1 Bd. Decision at 5; see also *Hot Shoppes Inc*., 146 NLRB 802, 805 (1964). As with other elements of an unfair labor practice, the General Counsel cannot prevail without a finding that the employer had an independent unlawful purpose. See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983).

The court in *New England Health Care Employees Union* addressed a question regarding whether the Board properly found that an employer's decision to keep the hiring of permanent replacements secret until the employer could "get as many bodies hired before the union found out" could support the finding of an "independent unlawful purpose." The court noted:

> Absent such countervailing considerations, and even if one adopts the Board's own analytic framework, logic suggests that an employer seeking to enhance its bargaining leverage by hiring permanent replacements would have every incentive to publicize the effort, and that an employer seeking only to prolong its ability to withstand the strike would be indifferent to whether the strikers and the union knew what it was doing. Conversely, it would appear that employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret. The replacement of over half of a unionized workforce with nonunion workers would devastate the union's power and credibility. An employer seeking to land such a blow cannot simply announce the hiring of large numbers of replacements, because in order to justify a refusal to allow striking workers to return to work under the "permanent replacement" safe harbor, the employer must have achieved an employment relationship with the permanent replacements somewhere between "a mere offer, unaccepted when the striker seeks reinstatement" and "actual arrival on the job." See *H & F Binch Co. v. NLRB*, 456 F.2d 357, 362 (2d Cir.1972). So an employer seeking to punish strikers and break a union therefore needs enough time to establish an employment relationship with a large number of permanent replacements before the union can react by offering to return to work, and will therefore have a strong incentive to keep the replacement program secret for as long as possible.

Id. at 195–196. The court remanded the case back to the board which is referenced as *Avery II*, 350 NLRB 214 (20017). In *Avery* II, the Board accepted the second circuit's finding that the "logical implication of Respondent's secrecy was an illicit motive." The Board thereafter found the record insufficient to refute the inferred unlawful motive.

I find the reasoning of the Board and the court in *New England Health Care Employees* instructive in addressing the issues presented in this case as in reality there are logical similarities between the facts presented in this case and *Avery II*. [2] It is undisputed in this record that

[2] Respondent argues that *Avery II* is of no precedential value and should not be recognized as controlling authority citing administrative law judge decisions that disagree with *Avery II*. It is within the

although Respondent determined in August that it would permanently replace employees and although the hiring of replacements began upon the strike's initiation on October 6, 2014, Respondent did not inform the Union of its hiring efforts until it had filled all of the positions. (Tr. 413, 417, 451, GC Exh. 6). I find applying similar reasoning as did the court in *New England Health Care Employees*, that when an employer waits until all of the positions are filled to notify the Union of its decision to replace employees this in itself creates a "logical implication" that Respondent's decision was the product of an "illicit motive." An employer with an illicit motive of breaking a union has a strong incentive to wait until after it has hired all of its permanent replacements to notify strikers because once the strikers find out about the decision to permanently replace them they could immediately unconditionally offer to return to work. In this case, the employer began its permanent replacement efforts on the first day. Had the strikers been informed on the first day they might have voted to unconditionally return that very same day, possibly even within hours. Waiting until all strikers positions are permanently filled before notifying of the decision to permanently replace them is calculated to deny strikers the opportunity of returning to work.[3]

General Counsel points to other evidence which supports the notion that the employer was motivated by an independent unlawful purpose. General Counsel points to Respondent's "Non-Union Philosophy which appears in its handbook. Respondent maintains an Associate Handbook that contains the following passage:

> Non-Union Philosophy: United Site Services will do everything in its legal power to prevent any outside, third party, who is potentially adversarial, such as a union from intervening or interrupting the one-on-one communications or operational freedoms that we currently enjoy with our associates. (GC Exh. 29 p. 7.)

General Counsel also points to following indirect evidence to support its contention that the employer was motivated by an independent unlawful purpose;(1) the ready availability of temporary workers, noting that the work is not skilled in nature, (2) Respondent had a ready supply of temporary labor, (3) Respondent had no contractual obligations with Labor Finders to hire their employees permanently, (4) the conversion of temporary employees to permanent employees resulted in the incursion of fees amounting to approximately $15,000 dollars, (5)

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province of the Board to resolve any ambiguities that exist regarding whether its decision in *Avery II* should be followed and if so what the applicable legal standards to be followed are. I decline to encroach upon resolving matters that are more properly reserved for the Board.

[3] Respondent asserts that the Board "firmly holds" that the employer has no obligation to notify strikers before hiring replacements citing *Armored Transfer Service*, 287 NLRB 1244 (1988). A careful reading of *Armored Transfer* reveals that the notion that the employer has no obligation to notify strikers is derived from a single sentence without any citation of legal authority in footnote 21 of the administrative law judge's decision. I question whether the single sentence of footnote 21 (although it might have been often repeated) was in fact subjected to the scrutiny of "reasoned decision making" required. See *Local Joint Executive Board of Las Vegas*, 309 F. 3d 578 (9th Cir. 2002). Regardless, accepting the premise that the employer had no obligation to notify strikers did nothing to insulate the Respondent in *Avery II* from liability.

Respondent sought to convert the temporary employees immediately upon the start of the strike, (6) Respondent held open positions for various hires.[4] (GC Br. at 62–67).

In sum, I find examining the totality of the evidence including the evidence specifically referenced in the above paragraphs that General Counsel has sustained its initial burden of showing that an independent unlawful purpose was a motivating factor in the employer's decision to permanently replace economic strikers. Thus, the burden shifts to show that it would have taken the same action even in the absence of unlawful purpose. I find that Respondent has failed in this regard. Moreover, I find its asserted reasons "to minimize training costs, reduce turnover, and maintain customer service levels" are mere pretexts. The reasons set forth by Respondent are simply logically inconsistent with the hiring of replacements. In the first instance, new employees would no doubt incur more training costs as well as the undisputed demonstrated additional costs to convert temporary Labor Finder's employees to permanent status. Secondly, the strikers knew the work, knew the routes and had been performing the work in a satisfactory fashion. Had Respondent been concerned about customer service levels and "turnover" it could have on the first day of the strike disclosed to the strikers its plan to replace them to induce them to abandon the strike and return to work. The reasons advanced by Respondent are simply not credible and don't even address the critical issue of why it waited until it filled the positions to disclose the hiring of permanent replacements. Thus, I find, as did the Board in *Avery II*, that the record is insufficient to refute the inferred unlawful motive and find that Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate permanently replaced economic strikers upon their unconditional offer to return to work. [5]

b) The Withdrawal of Recognition.

It is established law that "an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union." *Broadway Volkswagen*, 342 NLRB 1244, 1247 (2004) (citations omitted). In determining whether a causal relationship exists between the unremedied unfair labor practices and the loss of union support, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employees disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp*., 271 NLRB 78, 84 (1984). See also, *Beverly Health & Rehab Services*, 346 NLRB 1319 (2006).

Applying these factors here, I conclude that the Respondent's violation of the Act by refusing to recall striking employees would likely cause the Union to lose support among employees. I find that the unfair labor practice, discussed above, would, when viewed objectively, tend cause employee disaffection given that the withdrawal of recognition occurred

[4] It is important to note that this list is not an exhaustive list of all of General Counsel's contentions in this regard.

[5] Alternatively, I would find that waiting until after all positions are filled to notify the Union of the permanent replacement of strikers is "inherently destructive" of employees' right to strike. See *Great Dane*, 388 U.S. 26 (1967). The right to strike also includes enmeshed within it not only the right to strike but also the right to end the strike and return to work.

a mere 10 weeks after the unfair labor practices were committed. I also find that the unlawful refusal to reinstate union strikers and instead employing others not sympathetic to the strike would, when viewed objectively, have the tendency to cause disaffection. Also, the effects of the unfair labor practices were both detrimental and lasted through the time the withdrawal petition was circulated. See *D&D Enterprises*, 336 NLRB 850, 859 (2001). I find strong and compelling objective evidence in the record to show that a mere 10 weeks prior to the unfair labor practices there was a lack of disaffection. The Union won a Board certified election, the union members were actively participating in union affairs and the majority chose to strike with only 4 choosing to cross the picket line. This lack of prior disaffection is strong evidence of the causal connection to the unfair labor practices. See *Bunting Bearings Corp*., 349 NLRB 1070 (2007), holding that causal connection established in part by lack of prior evidence of disaffection. It is apparent that any Union loss of support among employees was causally related to the unfair labor practices discussed above.

In the alternative, I agree with General Counsel's assertion that in view of the fact that all of the replacements are regarded as illegitimate, Respondent cannot demonstrate an actual loss of majority. Discounting the illegitimate replacements, the Unit consisted of 25 employees only 7 of which constitute valid signatures. (GC Br. at 92-93, Jt. Ex 1, ¶¶27,33). I therefore find that the Respondent's withdrawal of recognition of the Union violated the Act.

CONCLUSIONS OF LAW

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

1. The Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the economic strikers upon their unconditional offer to return to work.[6]

2. The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of Local 315 as the bargaining representative of the employees at Respondent's Benicia facility.

Remedy

Having found Respondent has engaged in certain unfair labor practices, I find Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[6] It should be noted that General Counsel in its complaint alleged in the alternative that violations of the Act occurred involving the placement of employees on the permanent recall list and a transferee's placement into a permanent position. (GC Exh. 1(j).) These allegations were also the subject of a post hearing motion to strike portions of GC's brief filed by Respondent. In as much as these issues are subsumed within my finding that the entire failure to reinstate was unlawful, I need not reach these issues. The Respondent's motion to strike is accordingly denied.

a) Respondent shall be required to reinstate all Unit employees who engaged in the strike and make whole in all respects for all losses whatsoever resulting from Respondent's unlawful actions and its failure to reinstate the strikers beginning October 17, 2014. Back pay shall be computed from on a quarterly basis from the date of the failure to reinstate October 17, 2017, to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent shall file a report with the Regional Director for Region 20, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey*, 363 NLRB No. 143 (March 11, 2016). The Company shall also Compensate employees for the adverse tax consequences, if any, of receiving one or more lump-sum back pay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).[7]

b) Respondent will also be ordered to recognize and bargain in good faith with the Union as the exclusive bargaining representative of the Unit. Further, in the event that Respondent changed the units terms and conditions of employment following its withdrawal of recognition from the Union, upon the Union's request rescind such changes and restore the status quo ante and make whole the unit employees for losses in earnings and other benefits which they may have suffered as a result of such changes.

c) Respondent shall upon resumption of bargaining, bargain in good faith with the Union on request for the period set forth in *Mar-Jac Poultry Co*., 136 NLRB 785 (1962).

d) Respondent shall schedule a meeting during work hours with its employees and in the presence of a Board Agent read the attached notice to employees in English and Spanish. In the alternative, the Respondent shall arrange for a Board agent to read the notice in English and Spanish to employees during work hours in the presence of Respondent's supervisors.

e) Respondent will be ordered to post an appropriate notice.

[7] General Counsel argued that "search for work" and "work related expenses" ought to be charged to Respondent regardless of whether the discriminate received interim earnings during the period. As the Board has yet to authorize such as part of make whole relief, I decline to award it as a remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

Order

The Respondent, United Site Services of California, Inc., (insert city, state), its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in the following conduct

(a) Failing to reinstate the economic strikers upon their unconditional offer to return.

(b) Withdrawing recognition of Local 315 as the bargaining representative of the employees at Respondent's Benicia facility and thus failing to bargain with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) All strikers shall be offered reinstatement to their former positions if reinstatement has not already occurred and shall make the employees whole in all respects for any loss of earnings and other benefits suffered as a result of the unlawful conduct in the manner set forth in the remedy section of the decision. . Compensate the employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and shall file a report with the Regional Director for Region 20, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(b) Preserve and provide within 14 days at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(c) Recognize and bargain in good faith with the Union as the exclusive bargaining representative of the Unit. Further, in the event that Respondent changed the units terms and conditions of employment following its withdrawal of recognition from the Union, upon the Union's request rescind such changes and restore the status quo ante and make whole the unit employees for losses in earnings and other benefits which they may have suffered as a result of such changes.

(d) Within 14 days after service by the Region, post at its facility in Benicia County California copies of the attached notice marked "Appendix."[9] Copies of the notice, on

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 17, 2016

Dickie Montemayor
Administrative Law Judge

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

The Teamsters Local 315, IBT is the employee's representative in dealing with us regarding wages, hours or other working conditions of employees in the following unit:

All full time and regular part-time Service Technicians, Lead Service Technicians, Pick Up and Delivery Drivers, Mechanics, Laborers, and Fence Installers employed by the Employer at its 1 Oak Road, Benicia California facility, but excluding Dispatchers, supervisors and guards as defined by the Act

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT discriminate against employees because of their participation in a lawful strike or because of their support for Teamsters Local 315, IBT, or any other labor organization.

WE WILL NOT fail or refuse to reinstate employees engaged in a lawful economic strike, upon their unconditional offer to return to work, where it is shown, as in this case that we were motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

WE WILL NOT fail or refuse to reinstate employees engaged in a lawful economic strike to their former or substantially equivalent positions, following their unconditional offer to return to work where it is shown, as in this case that we were motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as your bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make all strikers whole for any loss of earnings and other benefits suffered as a result of our unlawful actions.

WE WILL, within 14 days from the date of the this Order, offer our employees who went on strike on October 6, 2014, and who have not yet been reinstated, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary any permanent and nonpermanent replacements hired during the strike.

WE WILL make whole the employees who went on strike on October 6, 2014, and who have not yet been reinstated, and the employees who may have been reinstated but whose reinstatement was delayed because a permanent replacement supposedly occupied their position on October 17, 2014, for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the this Order, remove from our files any reference to our unlawful termination, termination of reinstatement rights, and/or failure to reinstate the striking employees, and we will, within 3 days thereafter, notify each of them in writing that this has been done and that our unlawful failures will not be used against them in any way.

WE WILL, on request, bargain with the Union as your representative, and for 12 months thereafter as if the certification year had not expired, about your wages, hours, and other working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

UNITED SITE SERVICES OF CALIFORNIA, INC

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735

(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-139280 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5183.